



FILED

Mar 04 2009, 8:48 am

Kevin L. Smith

CLERK

of the supreme court,
court of appeals and
tax court

DARDEN, Judge

STATEMENT OF THE CASE

Reginald R. Bragg, pro se, appeals from the denial of his petition for post-conviction relief.

We affirm.

ISSUE

Whether the post-conviction court erred in denying Bragg's petition for post-conviction relief.

FACTS

We adopt the statement of facts set forth in this Court's decision in *Bragg v. State*, No. 18A05-0407-CR-353, slip op. at 2-4 (Ind. Ct. App. Jan. 25, 2005), which reads, in pertinent part, as follows:

Investigator Ken Lopez, a member of the Muncie-Delaware County Drug Task Force (Drug Task Force), began investigating Bragg after receiving a call from federal agents. Investigator Lopez arranged for Danny, who was a paid confidential informant used by the Drug Task Force, to contact Bragg. Investigator Lopez recorded a telephone call between Danny and Bragg by holding a digital tape recorder on the telephone receiver. Before the phone call, Investigator Lopez told Danny that he would like Danny to call Bragg, that the conversation would be recorded, and that Investigator Lopez would notify officers of the agreed meeting location after the conversation. Investigator Lopez also talked to Danny about wearing a body recorder and told him that both he and his vehicle would be searched before and after the buy. In response to Investigator Lopez's question of whether he understood the procedure for the controlled buy, Danny replied, "[Y]es, let's do it." Danny then made the phone call, and Investigator Lopez recorded the conversation. Danny then informed Investigator Lopez of the location where he was to meet Bragg.

On April 22, 2003, Investigator Jeff Stanley of the Drug Task Force searched Danny's person, clothing, and vehicle before the controlled buy. Danny was fitted with an electronic body transmitter so that investigators could listen to the drug transaction, and he was given money that had been photocopied. Investigator Stanley kept Danny under constant visual

surveillance after he had searched him, and Danny had no contact with any other person between Investigator Stanley's search and the meeting with Bragg.

Danny then drove to the intersection of Seventh and Madison Streets in Muncie, and he was followed a few minutes later by Bragg. Bragg got out of his vehicle and walked to Danny's vehicle. Bragg went to Danny's rolled-down window, and the two exchanged something in their hands. Bragg walked back to his vehicle and drove off. Officer Scott O'Dell and Investigator Jason Rogers followed Bragg's vehicle and saw it pull off of the road in front of a house. They pulled up to Bragg's vehicle as he was leaving it, and they identified themselves as police officers and told Bragg to lie on the ground. Bragg did not immediately comply, but instead turned to Officer O'Dell and said, "[Y]ou got me." Bragg had the marked money given to Danny by the Drug Task Force and two pill bottles, one of which contained cocaine, in his hands. At the time he was arrested, the officers were in possession of a warrant for Bragg's arrest. The distance from where Bragg pulled off the road to Garfield Elementary School was one hundred fifty-two feet. The distance from where Bragg sold Danny drugs to Garfield Elementary School was less than eight hundred feet.

Investigator Stanley met with Danny after the controlled buy, and Danny handed Investigator Stanley a paper bag containing three small Ziploc bags, each containing a white powdery substance that was later confirmed to be cocaine. Investigator Stanley again searched Danny, his clothes, and his vehicle, finding three bags of cocaine.

(Citations omitted).

The State charged Bragg with maintaining a common nuisance and two counts of dealing in cocaine. A jury found him guilty of maintaining a common nuisance as a class D felony and one count of dealing in cocaine as a class A felony. The trial court sentenced him to an executed sentence of thirty-two years.

Bragg appealed his convictions and sentences, raising the following issues:

(1) whether he received the ineffective assistance of trial counsel; (2) whether the trial court properly admitted into evidence an audiotape recording between Bragg and a confidential informant; (3) whether the trial court properly admitted evidence derived from his arrest; (4) whether the

trial court properly refused his proposed jury instruction regarding an affirmative defense; (5) whether the trial court properly sentenced him; and (6) whether there was sufficient evidence to sustain his dealing conviction.

Id. at 2. This Court confirmed Bragg's convictions and sentences on January 25, 2005.

Bragg, pro se, filed a petition for post-conviction relief on April 11, 2005. His later-appointed counsel filed an amended petition on October 31, 2007, in which he raised one issue: whether the jury rendered impermissibly inconsistent verdicts. The post-conviction held a hearing on Bragg's amended petition on January 24, 2008. On April 22, 2008, it entered findings of fact and conclusions of law, denying Bragg's petition. Bragg filed a motion to correct error, which the post-conviction court denied.

DECISION

Bragg asserts that he is entitled to post-conviction relief. A post-conviction petitioner bears the burden of establishing his claims by a preponderance of the evidence. *Lindsey v. State*, 888 N.E.2d 319, 322 (Ind. Ct. App. 2008), *trans. denied*. An appeal from the denial of post-conviction relief constitutes an appeal from a negative judgment. *Id.* Thus, to prevail on appeal from the denial of post-conviction relief, the petitioner must show that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite to that reached by the post-conviction court. *Id.* In the post-conviction setting, conclusions of law receive no deference on appeal. *Id.* As to factual matters, the reviewing court examines only the probative evidence and reasonable inferences that support the post-conviction court's determination and does not reweigh the evidence or judge the credibility of the witnesses. *Id.*

Post-conviction procedures do not afford a petitioner with a super-appeal, and not all issues are available. Rather, subsequent collateral challenges to convictions must be based on grounds enumerated in the post-conviction rules. If an issue was known and available, but not raised on direct appeal, it is waived. If it was raised on appeal, but decided adversely, it is res judicata.

Id.

Regarding ineffective assistance of counsel claims, “our supreme court has held that a Sixth Amendment claim of ineffective assistance of counsel may be presented for the first time in a petition for post-conviction relief.” *Godby v. State*, 809 N.E.2d 480, 483 (Ind. Ct. App. 2004), *trans. denied*. Where ineffective assistance of trial counsel is raised on direct appeal, however, it will be foreclosed in post-conviction proceedings. *Id.*

Finally, it is improper to review a fundamental error claim in a post-conviction proceeding. *Sanders v. State*, 765 N.E.2d 591, 592 (Ind. 2002). “In post-conviction proceedings, complaints that something went awry at trial are generally cognizable only when they show deprivation of the right to effective counsel or issues demonstrably unavailable at the time of trial or direct appeal.” *Id.*

Bragg asserts that he is entitled to post-conviction relief for the following reasons: (1) the jury rendered impermissibly inconsistent verdicts; (2) the evidence was insufficient to support his convictions; (3) the trial court abused its discretion in admitting testimony by denying Bragg his right to confront a witness; (4) the State lacked probable cause; and (5) he received ineffective assistance of trial counsel due to a purported conflict of interest. We disagree.

It is undisputed that all of the above claims were available to Bragg either during trial or on direct appeal. Furthermore, Bragg apparently raises claims in his petition for post-conviction relief that were decided adversely against him on direct appeal—including ineffective assistance of trial counsel. Therefore, his claims of error are waived or barred by res judicata.¹

Bragg also contends on appeal that the post-conviction court erred by failing to order the parties to submit proposed findings of fact and conclusions of law pursuant to Indiana Post-Conviction Rule 1(6), which provides that a post-conviction court “shall make specific findings of fact, and conclusions of law on all issues presented” Bragg does not contend that the post-conviction court failed to abide by this rule. Rather, he argues that the post-conviction court did not allow him to submit proposed findings of fact. Bragg, however, cannot show harm or prejudice. Also, he has failed to cite any authority in support of his claim or shown that he requested that he be allowed to submit proposed special findings of fact and conclusions thereon. Thus, this claim is waived. *See Smith v. State*, 822 N.E.2d 193, 202-03 (Ind. Ct. App. 2005) (“Generally, a party waives any issue raised on appeal where the party fails to develop a cogent argument or provide adequate citation to authority and portions of the record.”), *trans. denied*; *Nance v. Miami Sand & Gravel, LLC*, 825 N.E.2d 826, 834 (Ind. Ct. App. 2005), *trans. denied*.

Affirmed.

¹ Bragg has not provided this Court with a copy of his petition for post-conviction relief. We note that the only issue argued during the post-conviction hearing was whether the jury rendered inconsistent verdicts. Thus, it would appear that all but one of the errors raised by Bragg on appeal also are waived for failing to raise the errors in his petition for post-conviction relief. *See Koons v. State*, 771 N.E.2d 685, 691 (Ind. Ct. App. 2002) (“Issues not raised in the petition for post-conviction relief may not be raised for the first time on post-conviction appeal.”).

RILEY, J., and VAIDIK, J., concur.